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SUMMARY RECORD OF THE 684th MEETING

Held at Headquarters, New York,
on Friday, 16 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4); A/CN.9/XXXIII/CRP.4)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, having completed its consideration of the list of practices or receivables that would be excluded from the scope of the draft Convention, the Commission needed to decide what to do with the list. The first alternative would be to exclude those practices or receivables from the scope of application of the draft Convention as a whole, either under article 2 or under article 4, and possibly exclude certain practices only from the scope of articles 11 and 12. The main argument against partial exclusions was that a limited exclusion from articles 11 and 12 would mean that the exclusion of the practices concerned would depend on the existence of an anti-assignment clause and on the effect given to that clause by the applicable law.

2. The second alternative, which already existed in article 5, variant B, was to limit the scope of articles 11 and 12 to assignments of trade receivables. The exclusion of those practices would then be left to the parties, which would have to ensure that the anti-assignment clause was subject to a law which gave effect to it.

3. The Working Group had also taken up the question of the definition of trade receivables. The Commission might wish to consider whether it would be easier to define trade receivables rather than all types of financial receivables.

4. A third alternative, which was identified in the commentary, would be to amend article 11. It seemed that the provisions of that article might not work well in a great many cases. Article 11 focused on trade receivables, especially future receivables and bulk assignments; however, in the case of future receivables, there was as yet no contract, and in the case of bulk assignments, there were hundreds of contracts. Article 11 could therefore be turned around so that it would give effect to anti-assignment clauses, thereby eliminating the uncertainty attached to having the effectiveness of anti-assignment clauses left to law applicable outside the draft Convention. There would then be a single exception, for trade receivables. That approach would meet the needs of practices where anti-assignment clauses were routinely included and put into effect.

5. The CHAIRMAN said that the Commission seemed to agree that there should be a general definition of what would be encompassed within the draft Convention, but that it was not desirable to have a list of inclusions. The question then arose whether the list of exclusions should relate to the whole of the draft Convention, or only to certain provisions. Finally, the Commission needed to decide whether it wished to change article 11 from a provision that negated anti-assignment clauses to one that confirmed such clauses, with the proviso that it would not apply to trade receivables.

6. Mr. WINSHIP (United States of America) recalled that the ad hoc group on exclusions had prepared an informal text on excluded transactions, which had been read out at the 682nd meeting. The group had decided to seek clarification from the Commission as a whole on the issue of assignments of receivables arising from the sale of land.

7. The ad hoc group had also reached agreement that the terms "financial contract" and "netting agreement" should be defined, and that the definitions should be those suggested by the European Banking Federation, in document A/CN.9/472/Add.1, except that in the definition of "financial contract", in article 6, paragraph (n), the words "any deposit transaction" and the phrase "and any collateral or credit support related to any transaction referred to above" should be deleted. The group had also clarified that inter-bank payment systems involving only two banks would not be covered by exclusion (D).

8. His delegation considered that the language suggested by the ad hoc group was acceptable, and believed that the approach of total exclusion was preferable, for the reasons it had already explained. If that approach was not acceptable to the Commission, each of the transactions would need to be considered in the context of article 5, variant B, so that the Commission could consider whether a lesser exclusion would be appropriate for any or all of them. The list could then be included under variant B. His delegation noted, however, that variant B might not be sufficient; on the previous day, it had drawn attention to the need to adapt other provisions, such as the provisions of article 24, with respect to some of the practices in the list.

9. Mr. IKEDA (Japan) said that the list of exclusions should relate to the draft Convention as a whole; it did not support the idea that assignments of some receivables should be partially excluded from the scope of the draft Convention.

10. Ms. GAVRILESCU (Romania) said that, if a list of exclusions was to be included in the draft Convention, it should be a list of total exclusions. Furthermore, it must cover receivables arising from the sale of land. In Romania, international land transactions were prohibited under the Constitution and under a special law. Since the objective of the draft Convention was to develop international trade, receivables arising from the sale of land must be excluded from its scope.

11. The CHAIRMAN said that the Commission needed to decide whether there should be a list of items which would be covered by the draft Convention. There had been strong support for the position that there should not be such a list, but a general statement of what would be included. Depending on how that statement was formulated, the items set out in article 4 (1) could either be included within the general statement or excluded from it. If they were excluded, there would need to be additions to the list of exclusions recommended by the ad hoc group. The group's recommendations related only to the list of exclusions proposed by the United States delegation (A/CN.9/XXXIII/CRP.4) and was premised on the assumption that there was an exhaustive list of inclusions.

12. Mr. MORÁN BOVIO (Spain) said that a list of inclusions did not seem appropriate, as the draft Convention could function rather well over a long

period of time with just a few clear exclusions. If the draft Convention did contain two lists, there might be problems with issues that were not defined. His delegation supported the list of exclusions suggested by the ad hoc group.

13. He agreed with the observer for Canada that receivables resulting from the sale of land could be dealt with by means of article 24, and should not be excluded under article 2.

14. The current trend in the securitization sector was to bring together receivables related to real estate and those relating to movable property, as the customers of credit agencies were very happy with the yields provided by those securities both for assignment transactions and the receivables resulting from them.

15. Mr. WINTHROP (United States of America) said that his delegation's original support for a list of inclusions reflected its very practical approach. Trade receivables, intellectual property receivables and loan receivables had seemed to be the basic core transactions that would benefit from uniform rules in the area of assignment of receivables. Other types of transaction might also benefit. There were also financial transactions, many of which appeared on the list of exclusions, which were already well established or unlikely to benefit from such rules. The uniform rules themselves did not work well with respect to the appropriate priority rule, representations, anti-assignments, and identification of location, and might actually be detrimental to certain existing or evolving markets. However, the Commission could start with those cases where the rules were clearly beneficial, and perhaps make additions to that list when necessary. After consultations with industry groups, his delegation had started with a more limited list of transactions, but had still gone beyond the 1988 UNIDROIT Convention on International Factoring by including, in addition to trade receivables, loans, credit facilities in certain limited circumstances, and receivables arising from intellectual property.

16. Despite the lack of support for that approach, it still seemed the most effective way of approaching the practical problems of the global market for receivables and the Commission might wish to consider that issue again after considering variant B of article 5, or when it had examined each of the potentially difficult areas.

17. Ms. GAVRILESCU (Romania) said that transactions relating to land should be added to the list of exclusions in the draft Convention. Otherwise, the text would contradict a very important provision in the national legislation of Romania.

18. If there was a list, it should naturally include all the exclusions to which the Commission had referred. If land transactions were not included on that list, her delegation could, as a last compromise, support retaining article 4 (2) in its present form in order to be able to exclude some situations that did not conform to Romanian law.

19. Mr. MEDIN (Observer for Sweden) said that consultations with Swedish industry had revealed a preference for variant B of article 5. Sweden had always been concerned that assignments of financial receivables did not fit in

the draft Convention and was grateful to the United States delegation for the list of transactions to be excluded. His delegation supported their exclusion from the draft Convention as a whole.

20. If assignments of financial receivables were indeed to be excluded from the draft Convention, his delegation would withdraw its support for the retention of articles 4 (2) and 39, as they would no longer be required for that purpose.

21. Finally, with regard to the sale of land, he had understood that the Commission was in favour of exclusion of transactions relating to the sale of land, except in the case of lease of lands or securitized mortgages.

22. Mr. DOYLE (Observer for Ireland) said that an inclusive list would contradict the idea that the draft Convention should have the widest possible scope. Also, the Commission could never be certain that it had included everything that was needed.

23. He shared the view of the Japanese delegation that transactions should either be excluded or not excluded from the draft Convention as a whole, and that the list of exclusions should therefore be added to article 4.

24. In relation to the exclusions from article 11, he agreed with the comment by Mr. Bazinas that article 5 should be worded so that articles 11 and 12 applied only to assignments of trade receivables.

25. Finally, with regard to land, he was not aware that any consensus had been reached. His own delegations favoured the broadest possible exclusion.

26. Mr. STOUFFLET (France) agreed that many national legislations imposed restrictions on sales of land and real estate to foreigners. With regard to the issue raised by the representative of Romania, he noted that the draft Convention dealt only with assignment of receivables arising from the sale of real estate. The sale existed only if the competent law recognized the validity of the contract of sale.

27. If the Commission were to add the exceptions listed by the ad hoc group to those already included in article 4, the list would be rather varied, including consumers together with extremely sophisticated financial institutions. That was a practical and acceptable solution, although not very elegant in terms of style.

28. Regarding the extent of the exclusions, multiple options (complete exclusion, exclusion from the application of articles 11 and 12, and exclusion from the application of texts on priority) would make the draft Convention too complicated. For practical purposes, his delegation would support complete exclusion, in a concern to give as wide a scope as possible to the draft Convention. If article 4 (1) was to contain a general exclusion formula, a list of receivables subject to the draft Convention could be given in the commentary.

29. Mr. SCHNEIDER (Germany) said that his delegation had no difficulty with assignments of receivables arising from the sale of land appearing on the list of exclusions, but was concerned about receivables secured by mortgages on land.

30. There were three different concepts in the various domestic laws on mortgages. Under one concept, the transfer of a receivable secured by a mortgage meant that the mortgage followed the transfer of the receivable. Under another concept, the receivable would follow the transfer of a mortgage. A third concept was that the mortgage was not an accessory right, so that the receivable could be transferred without transferring the mortgage. In the latter case, a loan might be transferred, but the mortgage would not follow. However, there would be an obligation in the underlying contract to transfer the mortgage. Thus different rules would be applied: the transfer of the mortgage would be dealt with under domestic law, and the transfer of the receivable would be dealt with under the draft Convention. Whatever concept or combination thereof was adopted, assignments of receivable secured by mortgages on land should appear on the list for exclusion from the draft Convention. A general exclusion under article 4 (1) would be preferable; if that was not acceptable, he would wish to retain article 4 (2) so that Germany could exclude such receivables under that article or under article 39.

31. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) noted that, if the proprietary effects of an assignment of a receivable relating to real estate were governed by the law of the location of the real estate transfer, they could not then be subject to any other law. With reference to the problem raised by the representative of Romania, it should be made clear that the draft Convention would not affect the rules of public policy with regard to, in particular, transfers of real estate. He wondered whether the different choice of law rule would meet the concerns of the Commission in that respect.

32. Ms. McMILLAN (United Kingdom) said that total exclusion from the Convention was the simplest method and the easiest to justify in terms of presentation and practice, as certain transactions in receivables were totally outside the scope of the draft Convention.

33. With regard to land, her delegation's concerns could be met in article 11. It would be difficult to persuade the United Kingdom authorities that there was any justification for excluding assignments of receivables arising from the sale of land while including assignments of receivables arising from the lease of land: leases in the United Kingdom often covered such a long time period that there was very little difference between a sale and a lease of land. Any interference with the national regime of land registration that governed priority would be extremely difficult to justify, and could make the draft Convention unacceptable to the authorities of her country. The Commission should consider the total exclusion of assignments of receivables arising from transactions in land. Articles 4 (2) and 39 weakened the Convention, as one would always need to check the status of different contracting States with regard to exclusions. A clear text that could be adopted or rejected was far preferable to a text that could be adopted with reservations.

34. Ms. STRAGANZ (Austria) was against the idea of an inclusive list. Any exclusion should be total, and she supported the views expressed by the German delegation in favour of the total exclusion of real estate under article 4 (1). She also shared the United Kingdom view that articles 4 (2) and 39 would result in a lack of transparency and thus weaken the Convention.

35. Ms. WALSH (Observer for Canada) recalled her earlier suggestion that the problem of assignments of receivables secured by an interest in land or arising from the lease or sale of land might be dealt with by a choice of law approach in article 24, which would preserve application of the law of the State in which the land was located. That approach would deal with the rare case of a conflict arising between an assignee of a land-related receivable and a person who had an interest in the relevant land.

36. Mr. Al-SAIDI (Observer for Kuwait) said that assignments of receivables arising under bank deposit relationships (subparagraph (C) of the ad hoc group's proposal) should not be excluded from the scope of the draft Convention since the bank might also be a debtor. The setting of limits on bank deposits was better left to the parties concerned.

37. In reference to subparagraph (E), he noted that some States did not allow foreigners to acquire real estate; the Secretary of the Working Group on International Contract Practices had been very clear in his comments on that matter.

38. Ms. WALSH (Observer for Canada) proposed the following addition to article 24: "If the assigned receivable arises from the sale or lease of an interest in land, or is secured by such an interest, the rights of the assignee are subject to any competing rights of a person who holds an interest in the land under the law of the State in which the land is situated."

39. Mr. IKEDA (Japan) said that he would prefer not to amend the current text of article 24; it would be better to seek a solution in articles 4, 6, 11 and 12.

40. Mr. AKAM AKAM (Cameroon) agreed with the representative of Japan.

The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.

41. Mr. DESCHAMPS (Observer for Canada) explained that the exclusion of assignments of receivables secured by real estate mortgages would cause problems. Business loans were often syndicated and secured not only by the company's stock and receivables, but also by a mortgage on real estate. Thus, it would be arbitrary to exclude assignment of a receivable merely because it was secured by real estate. Furthermore, if an unsecured receivable was assigned and the debtor was later given a mortgage, the receivable would have been covered by the draft Convention at the time of assignment but would cease to be covered once the mortgage was taken out. To give yet another example, the comprehensive assignment of a company's trade receivables to a bank, which would be covered by the draft Convention, would fall outside the provisions of that instrument if the company issued a mortgage to its own clients since companies, in assigning their receivables to a bank as security, nevertheless retained the right to handle them.

42. Under the proposed text, when the assignment of receivables was secured by real estate, the provisions of the draft Convention (the law of the assignor's location) would apply. However, if the assignor assigned the receivable to a

third party who would have priority under real estate law, that law would take priority in case of conflict.

43. Mr. KUHN (Observer for Switzerland) said that he strongly supported the Canadian proposal.

44. Mr. MORÁN BOVIO (Spain) said that some years previously Spain had established a new real estate regime similar to that of the United States and Canada. Under that regime, real estate companies could sell receivables in the form of mortgages; such securitization provided a major source of financing for those companies. Thus, his delegation was categorically opposed to the exclusion of assignments of receivables arising from mortgages or the sale of land, and his Government would be unable to ratify the draft Convention if it contained such a provision.

45. Possible solutions, which were not mutually exclusive, would include: the deletion of all reference to real estate from the list of exclusions; the adoption of the Canadian proposal; or the lodging of reservations to those provisions by the States parties concerned.

46. Mr. DOYLE (Observer for Ireland) said that the Commission appeared to have reached an impasse. Therefore, while he would prefer the outright exclusion of real estate from the draft Convention, he was prepared to accept the Canadian proposal as a means of avoiding multiple reservations to the draft Convention upon its adoption.

47. Mr. WHITELEY (United Kingdom) said that he agreed with the delegations of Japan and France that article 24 might not be the best place for the rule in question. Also, it would be better to make an affirmative statement establishing that the location of real estate governed all matters relating to it. The solution might be to incorporate into article 25 a statement to the effect that, in such cases, priority should be given not to the law of the assignor's location, but to that of the jurisdiction in which the land was located.

48. Mr. STOUFFLET (France) said that the Canadian proposal might not fully meet the concerns raised by the Spanish delegation since, although it dealt with the matter of priority, it ignored the issue of foreign-owned mortgages on real estate located in the countries in question. Perhaps the wording of that proposal could be expanded along the lines indicated by the United Kingdom representative.

49. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that the securitization of mortgages, which had been introduced 20 years earlier, had had a dramatic effect on home ownership in the United States: mortgage rates were lower and more people owned houses than ever before. The draft Convention would go a long way towards extending those benefits to other parts of the world, particularly through the international recognition of bulk receivables. Adoption of the Canadian proposal would serve to improve the draft Convention still further; and there was no danger that practitioners would ignore local rules or sensibilities concerning real estate.

It was immaterial, from his point of view, whether the relevant provision appeared in article 24 or article 25.

50. Mr. Al-NASSER (Observer for Saudi Arabia) said that the Canadian proposal - which he preferred to that of the United Kingdom - provided a good basis for a compromise that took account of the concerns expressed by delegations whose national legislation differed as widely as that of Romania and Spain. Foreigners were not permitted to acquire or own real estate in his country, either; there was no question but that the law of the State where the real estate was situated should apply.

51. Mr. HERRMANN (Secretary of the Commission) hoped that the representative of Romania could clarify what in the draft Convention she found unacceptable. Romania barred foreign ownership and other countries placed limitations on it; but there was no contradiction between that position and the draft Convention. By definition, such countries would have no receivables which were owned by foreigners and thus subject to the draft Convention. A similar problem had arisen in relation to previous Commission texts, for example concerning the validity of transactions. National law, however, was paramount; if it excluded a particular practice, all other provisions were irrelevant. The concept of inclusion did not mean that all practices that were not excluded were valid in all circumstances. On the narrower question of receivables relating to real estate held by a Romanian national and assigned to another Romanian national, the provisions on priority in article 24 might be helpful.

52. Ms. GAVRILESCU (Romania) emphasized that the aim of her delegation was to achieve an outcome satisfactory both to countries which provided for the inclusion of real estate as a receivable and to those which did not. It was, however, important that the draft Convention should contain a provision - preferably in article 25 rather than article 24 - stating that any transaction relating to real estate should be governed by the law of the place where that real estate was situated. In the last resort, it was open to a State to lodge a reservation, as provided for under article 4 (2).

53. The CHAIRMAN invited the representative of the United Kingdom to inform the Commission of the precise terms of his delegation's proposal.

54. Mr. WHITELEY (United Kingdom) said that the text, which should constitute an additional paragraph to draft article 25, should read: "Where the assignment would transfer or create an interest in land, or a receivable arising from such an interest, the law of the State in which the land is located will govern the matters specified in article 24." It would be seen that the proposal was broader in scope than the Canadian proposal, which sought only to determine priorities.

55. Mr. SCHNEIDER (Germany) wished to dispel any impression that, when his delegation expressed concern with regard to any part of the draft Convention, it sought to destroy the markets. On the contrary, in the specific instance, mortgages had been of the utmost benefit to his country and others. The problem, however, was that a choice had to be made between two sets of rules: domestic legislation and the draft Convention. The latter did not apply to the special rules of assignments secured by mortgages, for example, so it was no

solution to add new provisions to articles 24 or 25. His preferred solution would be to exclude assignments of such receivables.

56. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, from the outset, there had been no intention that the draft Convention should override statutory limitations under which real estate could not be assigned to foreigners. Indeed, that position was explicitly set out in document A/CN.9/470, paragraph 84.

57. Mr. BURMAN (United States of America) said that he wished to associate himself with the remarks by the representative of Germany, which expressed precisely why his delegation had suggested a list of exclusions. The issue of real estate was clearly a delicate one, however, and care should be taken in dealing with it. He suggested that the delegations of Canada and the United Kingdom should jointly add more precision to their proposals. The phrase "interest in land", for example, was too vague.

The meeting rose at 1.05 p.m.